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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 426

WORLD PUBLISHING COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the District Court (R. 43-58) are reported at 72 F. Supp. 886. The opinion of the Court of Appeals and the dissenting opinion (R. 283-295) are reported at 169 F. 2d 186.

JURISDICTION

The judgment of the Court of Appeals was entered July 15, 1948 (R. 296), and petition for

rehearing was denied on August 26, 1948 (R. 303). The petition for a writ of certiorari was filed November 18, 1948. The jurisdiction of this Court rests upon 28 U. S. C., Sec. 1254.

QUESTION PRESENTED

Whether, with regard to taxpayer's liability for surtax under Section 102 of the Internal Revenue Code, the court below erred in holding that the evidence supports the District Court's findings that the accumulation of taxpayer's surplus profits in 1942 and 1943 was in excess of the reasonable needs of its business and that taxpayer failed to overcome the resulting statutory presumption that it was availed of for the purpose of preventing the imposition of surtax upon its shareholders.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Treasury Regulations are set forth in the Appendix, *infra,* pages 18-23.

STATEMENT

The facts found by the District Court (R. 43-45, 47-55) are as follows:

Taxpayer was organized in 1906 under the laws of the Indian Territory as the World Publishing Company of Indian Territory. In 1913 its name was changed to World Publishing Company. Its original capital stock consisted of 1,000 shares of the par value of $25, a total of $25,000, which was fully paid and issued. The capital stock was in-

creased to 5,000 shares of like par value on April 1, 1913, about the time Mr. Eugene Lorton purchased one-half of the stock, and was again increased in 1918 after Lorton had acquired the remaining stock in 1917. There was a further increase in 1922 to 10,000 shares at a par value of $100 a share, a total of $1,000,000. Summarized, the consideration for the common capital stock was $25,010 in cash for 250.1 shares, $420,000 for stock dividends, and $544,990 for goodwill, press franchise and subscription lists. The corporation was not formed for the purpose of preventing increased surtax on its shareholders. (R. 43-44.)

At all times material to this action taxpayer was owned and controlled by Mr. Eugene Lorton, he having acquired 50 percent of the outstanding capital stock in 1913 and the remaining outstanding capital stock in 1917. At the time this suit was instituted, he was the owner of 9,997 shares of the stock. His wife, Mrs. Maude Lorton, held one share; F. O. Larson one share; and N. G. Henthorne one share. (R. 44.)

The shareholders for the years 1942 and 1943 were the same as set out above. Maude Lorton was the wife of Eugene Lorton in 1913 when he acquired 50 percent of the stock, and that relationship has continued until the present time. Mr. F. O. Larson has been the business manager of taxpayer for many years and Mr. N. G. Henthorne has also been with taxpayer and Mr. Lor-

ton for many years in different capacities. The salaries paid the officers and directors for their duties in their respective positions in 1942 and 1943 are as follows: Mr. Eugene Lorton, $50,000; Mrs. Maude Lorton, $7,200; Mrs. F. O. Larson, $16,100; and Mr. N. G. Henthorne, $16,100. The record discloses no loans or advances by taxpayer to its shareholders. (R. 44-45.)

In the beginning, taxpayer published, owned and operated a modest newspaper and printing plant but adequate to the needs of Tulsa. Its growth increased with the growth of Tulsa, and commensurate with the growth of Tulsa and its trade territories, and consistent with able management, the circulation of the paper grew. Because of the increased circulation and of increased demands of the community, it was necessary from time to time to increase the equipment and facilities of the newspaper. It outgrew its quarters and facilities in 1913 and procured other quarters. It secured improved printing equipment in 1917. At this time, to house its printing establishment, a five story building was erected, the World Building, which was raised to nine stories in 1927. These purchases and improvements kept pace with the increasing demands. In January, 1940, taxpayer purchased an adjoining lot to that owned by it, and upon which the World Building had been constructed, for the purpose of further expansion of the plant. It was the practice to pay

for the new building and equipment from the earnings of the taxpayer, and to a large extent the earnings went back into or were held for the expansion of the plant in order to meet its increased needs. (R. 47-48.)

The Tulsa Tribune was a newspaper published in Tulsa during this time, which likewise benefited from the growth of Tulsa. In the month of June, 1941, the two newspapers merged their mechanical, circulation, and business departments and thereafter they were conducted in the World Building and by taxpayer's operating equipment. The medium of the operation of these activities was the Newspaper Printing Company, an agency corporation. At first the result of the merger did not evidence any increase in the net earnings of the two papers but in 1942 and 1943 the more economical operation under the merger began to reflect very favorably in the profits. (R. 48.)

The printing merger increased the demands upon the printing and mechanical facilities of taxpayer. During 1942 and prior thereto the acquisition of a new and modern press by taxpayer was considered. Such a plant, because of its size and mechanical constructions, required that a building be built for the purpose of housing the plant. It was decided to build an addition to the World Building upon the adjacent lot purchased in 1940, a suitable location for the improvement. In keeping with the practice of paying for such

improvements out of its earnings, taxpayer had begun accumulating a fund for that purpose. (R. 49.)

The inadequacy of the printing press and the necessity for making provisions for a new press, accessory machinery and other equipment and a suitable building for housing the improvements were discussed at a meeting of the directors in December, 1939, at which time a resolution to set aside a fund for the purpose was passed. The advisability of increasing the facilities was further discussed on December 21, 1942, and the appropriate cost considered. There was also a discussion of the possibility of a diminution of the income of the Company without any reduction of the taxes and of the advisability of creating a fund to meet the demands of the business. Accordingly, a resolution was passed to withhold dividends and to set aside $150,000 for the purchase of press and accessory equipment and $100,000 for the press building bringing the earmarked accumulation of expansion to $500,000. (R. 49.)

In January, 1944, another directors' meeting was held and the past negotiations that had then taken place for a new press were related and considered. It was decided that the sooner an order was made the sooner it would be on the post-war schedule of press manufacturers and that plans should be completed as soon as possible for the

construction of the new building. Thereafter, steps were taken to place an order with a press manufacturing company. There can be no doubt that there was a reasonable, though not acute, need for a new press, accessory machinery and the housing unit therefor in 1942. (R. 50.)

There were some negotiations for the purchase of a new press in 1942, which continued from time to time during the subsequent years with various manufacturers until a contract for the press was entered into and a deposit made on or about May 25, 1945. During this same time plans were formed for the demolition of the old structure on the recently acquired lot and for the erection of the new building for the housing of the new press and other accessory equipment. (R. 50.)

The anticipated minimum cost of the new press and accessory equipment at the end of 1942 was $350,000. Of this amount taxpayer was to bear one-half and the Tribune one-half. Expansion plans were one phase of the formation of the joint agency corporation. There was speculation that the Tribune would be unable to advance its one-half of the obligation, necessitating taxpayer's putting up the entire amount at the outset. The cost of the housing unit which was to be borne solely by taxpayer was estimated at $150,000 in 1942. It was probable that the cost of the contemplated expansion would exceed the above estimated cost. (R. 50-51.)

The book value of taxpayer's investments in stocks, bonds and cash over liabilities on December 31, 1941, was $427,287.39 and the fair market value of the same items, exclusive of the claim for taxes under Section 102, was $496,168.65 on December 31, 1942, and $645,878.61 on December 31, 1943. Book value is given for the close of 1941 as the market value is not shown by the record. These balances are persuasive that sufficient assets were on hand to carry out the desired expansion program. (R. 51-52.)

The accumulated earned surplus shown on taxpayer's books as of the end of each year was as follows: 1941, $562,521.98; 1942, $643,062.26; 1943, $739,626.47. Thus, at the beginning of 1942 the accrued surplus was greater than the December 21, 1942, estimate of the minimum cost of the new press, accessory equipment and the cost of building the housing unit—even disregarding the obligation of the Tribune to bear half of the cost of the press and allied equipment. (R. 52.)

For the year 1942 taxpayer set aside earnings for the expansion program and did not pay any dividends. The Commissioner determined the net income for the year 1942 to be $133,026.43 and subject to a federal income tax, exclusive of the surtax on undistributed surplus under Section 102, of $52,595.84. The balance of $80,430.59 was held subject to the Section 102 surtax, which amounted to $22,118.41. Upon the deficiency being

declared, taxpayer paid the amount thereof with interest and in due time made application for refund. (R. 51.)

For the year 1943 the net earnings were also set aside for use in the expansion program. The Commissioner fixed the net income at $247,351.18. Deducting therefrom the federal income tax, exclusive of surtax on undistributed earnings, of $46,320.58, and the income of $130,033.16 subject to excess profits tax, a balance remained of $70,997.44. That amount was subjected to undistributed surplus tax under Section 102 in the amount of $19,524.30. The deficiency tax was paid with interest and in due time application for refund was filed by taxpayer. (R. 51.)

By duly enacted laws of Congress surtax rates on the income of individuals were increased substantially for the years under consideration. If taxpayer had paid out its earned surplus (or net earnings) in dividends during the years 1942 and 1943, it would have increased the surtax liability of its owner, Mr. Lorton, in the amount of $69,520.35. (R. 45.)

Testimony was received that several hundred thousand dollars working capital was necessary in the business, thus establishing the sum available for the expansion program below its 1942 estimated cost. Since the successful formation of the joint printing enterprise, however, that figure is wholly unreasonable. The Newspaper Print-

ing Corporation handled the part of the business wherein the testimony showed substantial working capital was needed, and since the original advance to it of $60,000 each by both taxpayer and the Tribune, no further advances are reflected in taxpayer's balance sheets, and beginning in 1942, the Newspaper Printing Corporation did nothing but return bountiful profits to each of the newspapers. The successful operation of this company on the funds furnished showed that exclusive of a nominal amount to maintain taxpayer's editorial staff no additional working capital was needed by the World Publishing Company.[1] (R. 52.)

Any inference that the figure representing reserve for depreciation should be subtracted from surplus before calculating the sum left available for expansion is unreasonable here. The construction of taxpayer's books as well as general accounting practice in relation to such a reserve set it up as a charge against the assets depreciated. It is clearly treated as a valuation reserve. Were it a replacement or funded reserve as taxpayer apparently seeks to treat it now, the books and balance sheets of taxpayer would so indicate.

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[1] Taxpayer's balance sheets showed, under liabilities, that accounts payable ranged from the year 1934 through the year 1940 from $43,174.60 to $57,932.98 and that in the years 1941, 1942 and 1943 they dropped to $8,200.33, $5,563.35 and $5,508.70, respectively. Likewise, accrued expenses for the period 1934 to 1940 ranged from $10,204.86 in 1934 to $30,346.53 in 1940 and in 1941, 1942 and 1943 dropped to $22,971.59, $2,569.65 and $8,243.36, respectively. (Stip. Ex. A, R. 25.)

Moreover, it would be unusual for a business of this kind to maintain a funded reserve for depreciation. The depreciation is slow and regular; the assets, its building and press equipment, are not subject to frequent replacement from rapid deterioration or obsolescence. The old presses and that part of the old buildings housing them were not to be abandoned but used as standby facilities and on special jobs. They would have substantial value. Taxpayer may not deduct its reserve for depreciation or any part of it from surplus to determine the amount available for the expansion program at the dates in question. (R. 52-53.)

The minutes of the directors' meeting of December 21, 1942, and other testimony upon the possibility of diminution in future profits because of the exigencies, priorities and material shortages of war are offered as further reason for retaining the corporate earnings. In the case of this taxpayer at the end of 1942 and 1943 it was unreasonable that further accumulation to the $562,521.98 surplus on the books as of the end of 1941 would become necessary for that reason. There was also the book value excess of stocks, bonds and cash over liabilities of $427,287.39 at the end of 1941. Taxpayer was strong, both currently and historically. It had no debts except current operating ones. It had virtually no competition. The size and wealth of its circulation territory

had been constantly growing. As a result of its printing arrangement with the Tribune, its 1942 net earnings almost trebled its previous 8-year average—even after deducting high wartime taxes —and more than trebled it in 1943. It faced no substantial change in the art, no sudden loss of any substantial part of its source of revenue. The basis of its revenue was broad and stable. None of the operating materials it had to buy nor the product and service it had to sell were subject to serious fluctuations in price. Its business depended on the life of no patents. It was concerned with no erratic investment values. The possibility of labor unrest was not a serious problem. Legislation adverse to the prosperity of the business was not in prospect. It was a type of business which the war affected comparatively slightly in its day-to-day operations. It had none of the problems of conversion into wartime production and post-war reconversion. Restriction of foreign commerce could affect it little. It encountered some shortages, such as gasoline, tire, automotive equipment and newsprint, but they did not put the newspaper business in a financially precarious position, or indicate any financial uncertainty for the future. (R. 53-54.)

The Second World War began on December 7, 1941. Thereafter, it was impossible to secure the desired equipment for the expansion program. According to the minutes of December, 1942, it

was realized that "a program of this nature could not be effectuated until after cessation of hostilities * * *" and that we were in the midst of a "protracted war." Likewise the minutes of the January, 1944, meeting reflected that the consummation of taxpayer's expansion program lay in the indefinite postwar future. (R. 54.)

It did not appear reasonable to presume that war could end during the year 1943. There was some speculation of an ending in the summer of 1944. Therefore, there could have been no anticipation of the possibility of making the contracts for purchase of such heavy equipment as presses or of acutely scarce building materials for the housing unit until there was a reasonable prospect of the ending of the war. (R. 54.)

The claim of need for conservation for war contingencies in 1942 and 1943 further illuminates the view taxpayer took then of its need for expansion. The state of the times in 1942 and 1943 would not have permitted needs for both to stand side by side. Though the first may have justified a need for some accumulation, perhaps as much as taxpayer had on hand at the beginning of 1942, the apprehension it reflected negatived any reasonable expectation of fulfillment of an expansion program in the immediate future. (R. 54.)

The expansion program considered by taxpayer was not such a project that could be accomplished quickly following the making of a contract so that

it would call for the entire cost in cash virtually all at once and on the contract date, or even within the space of a few months. The manufacturer of the press would have to reconvert from wartime assignment, make a detailed design and then manufacture the press. Except the small down payment, the payment for the press would not be made until delivery. As the building had to be built around the press it could not be begun until after the press was ordered. Much time would elapse before the cash outlay for the building, too, would be necessary. (R. 54-55.)

A contract supported by a down payment of $10,000 (R. 87) was entered into by taxpayer for the press on May 25, 1945. The old building on the lot upon which the housing for the new press was to be built was demolished in the latter part of 1946. The present plans call for the erection of the building and the installation of the equipment by the summer of 1947, at a cost of $635,000 for the press, accessory equipment and installation and approximately $300,000 for the building. The press contract obligated taxpayer to pay the entire cost of the press, although by separate agreement with the Tribune, the latter will ultimately bear one-half of the cost. (R. 55.)

The District Court concluded as an ultimate fact that the accumulation of the surplus profits (or net earnings) of 1942 and 1943 was in excess of the reasonable needs of the business because of

the adequacy of the previously accrued surplus and the necessary remoteness of the contemplated expansion at that time. The District Court also stated that the proposed venture into the radio broadcasting business was not a part of the needs of this business and that the same finding as to remoteness would also strike such a venture down as a purpose for the accumulations by taxpayer in 1942 and 1943. (R. 55.)

On the basis of these conclusions, the District Court sustained the Commissioner's determination that taxpayer is liable for surtax for the years 1942 and 1943 under Section 102 of the Internal Revenue Code. (R. 55-58.) The decision was affirmed on appeal (R. 283-289), with Judge Phillips dissenting (R. 289-295).

ARGUMENT

1. Contrary to taxpayer's assertion (Pet. 8-9), the question involved in this case does not require decision by this Court. Taxpayer's position that it does seems to rest primarily upon an argument that during a war the newspaper industry should be allowed to accumulate earnings or profits without penalty. (See Pet. 8-9; Br. 13-17.) That argument of course ignores the provisions of Section 102 of the Internal Revenue Code (Appendix, *infra*, p. 18), upon which the deficiency against taxpayer was based. Taxpayer also asserts that the "holding" that radio broadcasting is not a proper newspaper function is arbitrary and of

great public importance. (Pet. 8-9; Br. 23.) That so-called "holding" is but taxpayer's interpretation of the finding of the District Court that taxpayer's proposed venture into the radio boardcasting business was not a part of the needs of its business. The opinion of the Court of Appeals does not mention the radio broadcasting business and the findings of the District Court in that connection were not essential to decision in the case, taxpayer not having urged in either the District Court or the Court of Appeals that the accumulation of its 1942 and 1943 earnings was related to a proposed venture into the radio broadcasting business.[2]

The case involves purely factual questions (see *supra,* p. 2) and therefore turns upon its own facts. The factual questions were resolved against taxpayer by both the District Court (R. 51-55, 57) and the Court of Appeals (R. 285-289) and, we submit, correctly so. Cf. *Helvering* v. *Nat. Grocery Co.,* 304 U. S. 282; *Helvering* v. *Stock Yards Co.,* 318 U. S. 693. No improper test was applied in the resolution of the questions. Taxpayer's assertion to the contrary—that the court

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[2] The evidence in this connection simply reflects that taxpayer contemplated a venture into the radio broadcasting business at some indefinite time in the future. (See R. 94-95.) The District Court stated both that the proposed venture was not a part of the needs of taxpayer's business and that "The same finding as to remoteness would also strike such a venture down as a purpose for the accumulation by the World in 1942 and 1943". (R. 55.)

below applied the standard of "immediate expenditure" rather than "business need" (Br. 17)—is answered by the statement of the court below that "it is not required that the reserves be spent in the year in which they are created, so long as there is a present need for the expenditure" (R. 288).

2. The alleged conflict with *Commissioner* v. *Cecil B. De Mille Productions,* 90 F. 2d 12 (C. C. A. 9th), certiorari denied, 302 U. S. 713, is nonexistent. That case is merely one in which a different result was reached on different facts. The Tax Court decisions cited by taxpayer (Br. 26-28) are similarly distinguishable on their facts.

CONCLUSION

The decision below is correct and involves no conflict of decisions or important question of federal law. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

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DECEMBER 1948.

APPENDIX

Internal Revenue Code:

SEC. 102. SURTAX ON CORPORATIONS IMPROPERLY ACCUMULATING SURPLUS.

(a) [As amended by Sec. 103(d), Revenue Act of 1941, c. 412, 55 Stat. 687] *Imposition of Tax.*—There shall be levied, collected, and paid for each taxable year (in addition to other taxes imposed by this chapter) upon the net income of every corporation (other than a personal holding company as defined in section 501 or a foreign personal holding company as defined in Supplement P) if such corporation, however created or organized, is formed or availed of for the purpose of preventing the imposition of the surtax upon its shareholders or the shareholders of any other corporation, through the medium of permitting earnings or profits to accumulate instead of being divided or distributed, a surtax equal to the sum of the following:

27½ per centum of the amount of the undistributed section 102 net income not in excess of $100,000, plus

38½ per centum of the undistributed section 102 net income in excess of $100,000.

(b) *Prima Facie Evidence.*—The fact that any corporation is a mere holding or investment company shall be prima facie evidence of a purpose to avoid surtax upon shareholders.

(c) *Evidence Determinative of Purpose.*—The fact that the earnings or profits of a cor-

poration are permitted to accumulate beyond the reasonable needs of the business shall be determinative of the purpose to avoid surtax upon shareholders unless the corporation by the clear preponderance of the evidence shall prove to the contrary.

(d) [As amended by Sec. 138, Revenue Act of 1942, c. 619, 56 Stat. 798] *Definitions.*—As used in this chapter—

(1) *Section 102 Net Income.*—The term "section 102 net income" means the net income, computed without the benefit of the capital loss carry-over provided in section 117(e) from a taxable year which begins after December 31, 1940, and computed without the net operating loss deduction provided in section 23(s), minus the sum of—

* * * * *

(26 U. S. C. 1946 ed., Sec. 102.)

Treasury Regulations 111, promulgated under the Internal Revenue Code:

SEC. 29.102-1. *Taxation of Corporation Formed or Utilized for Avoidance of Surtax.*—Section 102 imposes (in addition to other taxes imposed by chapter 1) a graduated income tax or surtax upon any domestic or foreign corporation formed or availed of to avoid the imposition of the individual surtax upon its shareholders or the shareholders of any other corporation through the medium of permitting earnings or profits to accumulate instead of dividing or distributing them. However,

personal holding companies, as defined in section 501, and foreign personal holding companies, as defined in Supplement P (see section 331), are excepted from taxation under section 102. The surtax imposed by section 102 applies whether the avoidance was accomplished through the formation or use of only one corporation or a chain of corporations. For example, if the capital stock of the M Corporation is held by the N Corporation so that the dividend distributions of the M Corporation would not be returned as income subject to the individual surtax until distributed in turn by the N Corporation to its individual shareholders, nevertheless the surtax imposed by section 102 applies to the M Corporation, if that corporation is formed or availed of for the purpose of preventing the imposition of the individual surtax upon the individual shareholders of the N Corporation.

* * * * *

SEC. 29.102-2. *Purpose to Avoid Surtax; Evidence; Burden of Proof; Definition of Holding or Investment Company.*—The Commissioner's determination that a corporation was formed or availed of for the purpose of avoiding the individual surtax is subject to disproof by competent evidence. The existence or nonexistence of the purpose may be indicated by circumstances other than the evidence specified in the Internal Revenue Code, and whether or not such purpose was present depends upon the particular circumstances of each case. In other words, a corporation is subject to taxation under section 102 if it is formed or availed of for the *purpose* of preventing the im-

position of surtax upon shareholders through the medium of permitting earnings or profits to accumulate, even though the corporation is not a mere holding or investment company and does not have an unreasonable accumulation of earnings or profits; and on the other hand, the fact that a corporation is such a company or has such an accumulation is not absolutely conclusive against it if, by clear and convincing evidence, the taxpayer satisfies the Commissioner that the corporation was neither formed nor availed of for the purpose of avoiding the individual surtax. All the other circumstances which might be construed as evidence of the purpose to avoid surtax cannot be outlined, but among other things the following will be considered: (1) Dealings between the corporation and its shareholders, such as withdrawals by the shareholders as personal loans or the expenditure of funds by the corporation for the personal benefit of the shareholders, and (2) the investment by the corporation of undistributed earnings in assets having no reasonable connection with the business. The mere fact that the corporation distributed a large portion of its earnings for the year in question does not necessarily prove that earnings were not permitted to accumulate beyond reasonable needs or that the corporation was not formed or availed of to avoid surtax upon shareholders.

If the Commissioner determines that the corporation was formed or availed of for the purpose of avoiding the individual surtax through the medium of permitting earnings or profits to accumulate, and the taxpayer contests such determination of fact by litigation, the burden of

proving the determination wrong by a preponderance of evidence, together with the corresponding burden of first going forward with evidence, is on the taxpayer under principles applicable to income tax cases generally, and this is so even though the corporation is not a mere holding or investment company and does not have an unreasonable accumulation of earnings or profits. However, if the corporation *is* a mere holding or investment company, then the Internal Revenue Code gives further weight to the presumption of correctness already arising from the Commissioner's determination by expressly providing an additional presumption of the existence of a purpose to avoid surtax upon shareholders, while if earnings or profits are permitted to accumulate beyond the reasonable needs of the business, then the Code adds still more weight to the Commissioner's determination by providing that irrespective of whether or not the corporation is a mere holding or investment company, the existence of such an accumulation is *determinative* of the purpose to avoid surtax upon shareholders unless the taxpayer proves the contrary by such a clear preponderance of all the evidence that the absence of such a purpose is unmistakable.

* * * * *

SEC. 29.102-3. *Unreasonable Accumulation of Profits.*—An accumulation of earnings or profits (including the undistributed earnings or profits of prior years) is unreasonable if it is not required for the purposes of the business, considering all the circumstances of the case. It is not intended, however, to prevent accumulations of surplus for

the reasonable needs of the business if the purpose is not to prevent the imposition of the surtax. No attempt is here made to enumerate all the ways in which earnings or profits of a corporation may be accumulated for the reasonable needs of the business. Undistributed income is properly accumulated if retained for working capital needed by the business; or if invested in additions to plant reasonably required by the business; or if in accordance with contract obligations placed to the credit of a sinking fund for the purpose of retiring bonds issued by the corporation. The nature of the investment of earnings or profits is immaterial if they are not in fact needed in the business. Among other things, the nature of the business, the financial condition of the corporation at the close of the taxable year, and the use of the undistributed earnings or profits will be considered in determining the reasonableness of the accumulations.

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